

Supreme Court, U. S.

FILED

OCT 4 1979

MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT
OF THE UNITED STATES
OCTOBER TERM 1979

No. 79-557

TOWN & COUNTRY ESTATES, INC.

Petitioner,
vs.

LI REN FONG,

Respondent.

PETITION FOR WRIT OF
CERTIORARI TO THE UNITED
STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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October, 1979

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1979

No.

TOWN & COUNTRY ESTATES, INC.,

Petitioner,

vs.

LI REN FONG,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE EIGHTH CIRCUIT

The petitioner, Town & Country Estates, Inc.,
prays that a writ of certiorari issue to review
the opinion and judgment of the United States
Court of Appeals for the Eighth Circuit rendered
in these proceedings on June 19, 1979. Petitioner's
motion for rehearing was denied by the United
States Court of Appeals on July 10, 1979 and the
Court's mandate was issued on July 24, 1979.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit appears in Appendix A, infra, pp. A-2 to A-12 and is reported at 600 F.2d 179 (8th Cir. 1979). The judgment of the United States Court of Appeals for the Eighth Circuit appears in Appendix A, infra, pp. A-13 to A-14. The order denying a rehearing entered by the United States Court of Appeals for the Eighth Circuit appears in Appendix A, infra, p. A-15. The judgment of the United States District Court for the Western District of Missouri, Western Division appears in Appendix A, infra, pp. A-16 to A-17. The order entered by the United States District Court for the Western District of Missouri, Western Division denying petitioner's alternative motion for judgment or for a new trial appears as Appendix A, infra, pp. A-18 to A-19. No written opinion, other than the judgment, was entered by the United States District Court for the Western District of Missouri, Western Division.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on June 19, 1979. (Appendix A, infra, pp. A-13 to A-14). A petition for rehearing, timely served and filed on June 29, 1979, was denied by the United States Court of Appeals on July 10, 1979. (Appendix A, infra, p. A-15) This petition for certiorari was filed less than ninety days from the order denying petitioner's rehearing request. Accordingly, jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether the United States Court of Appeals for the Eighth Circuit has so far departed from applicable Missouri law, relating to the appropriate measure of damage in a misrepresentation action, as to require an exercise of this Court's supervisory powers.

CONSTITUTIONAL PROVISIONS INVOLVED

This action involves no constitutional questions.

STATEMENT OF FACTS

This action was filed in the United States District Court for the Western District of Missouri, Western Division pursuant to diversity of citizenship and an amount in controversy exceeding \$10,000.00. (28 U.S.C. §1332).

The substance of the alleged claims was that Town & Country Estates, Inc. misrepresented to Mr. Fong that the Shopping Center owned by Town & Country Estates, Inc. was fifty percent leased. Mr. Fong allegedly relied upon this statement in executing a five year lease for space in the Shopping Center.

Mr. Fong retained the leased premises after discovering the alleged misrepresentation and at trial sought money damages against Town & Country Estates, Inc. Town & Country Estates, Inc. sold the Shopping Center to a third party who, prior to the trial of this action on November 7, 1978, released Mr. Fong from all obligations under his five year lease.

The United States Court of Appeals for the Eighth Circuit affirmed the District Court's judgment in favor of Mr. Fong and approved and applied a measure of damage rule applicable to an equitable action in rescission instead of a measure of damage rule applicable to a legal action for money damages.

REASONS FOR GRANTING THE WRIT

In its opinion (Appendix A, pp. A-8 to A-9), the United States Court of Appeals for the Eighth Circuit acknowledged that there are two measure of damage rules applicable in a Missouri misrepresentation action. "Benefit-of-the-bargain" damages are awarded when a defrauded party retains the property while "expense" or "status quo" damages are awarded when the transaction is rescinded and the property is returned to the party making the misrepresentation. Salmon v. Brookshire, 301 S.W.2d 48 (Mo. App. 1957); Shroeder v. Zykan, 255 S.W.2d 105 (Mo. App. 1953); Salter v. Heiser, 39 Wash. 2d 829, 239 P.2d 327 (Wash. 1951).

After acknowledging the correct Missouri misrepresentation law relating to damage, the United

States Court of Appeals for the Eighth Circuit totally departed from this established precedent in affirming the judgment of the United States District Court for the Western District of Missouri.

In its opinion, the United States Court of Appeals for the Eighth Circuit holds that the "out-of-pocket" measure of damage is applicable because Mr. Fong was not in possession of the leased premises at time of trial. This holding is based upon a misinterpretation and misapplication of the "out-of-pocket" rule and is a complete departure from any current decisional law in Missouri as indicated below.

The "out-of-pocket" measure of damages is a minority rule (not followed in Missouri) which is applicable in some jurisdictions when property, the purchase or lease of which is induced by misrepresentation is retained and damages are sought. Kendrick v. Ryus, 225 Mo. 150, 123 S.W. 937, 939 (Mo. 1909); McFarland v. Cobb, 64 S.W.2d

931, 935 (Mo. 1933); Prosser on Torts, pp. 733-734 (3rd ed. 1964); Salter v. Heiser, supra. at 331. This rule measures the difference between the consideration paid and the real value of the property purchased or leased. Id.

However, in Missouri when property, the purchase or lease of which is induced by misrepresentation, is retained, the majority "benefit-of-the-bargain" rule is followed. This rule measures the difference between the value as represented and the real value of the property purchased or leased. Id.; Salmon v. Brookshire, supra.

Because Mr. Fong retained and occupied the leased premises for approximately sixteen months after he discovered the alleged misrepresentation, because Mr. Fong was in possession of the premises when he filed his Complaint and because Mr. Fong specifically waived any rights to rescind the transaction, by written document filed with the District Court, the "benefit-of-the-bargain" rule is the only applicable measure of damage

standard. Because no evidence was presented to sustain a finding of damage under the "benefit-of-the-bargain" rule, judgment should have been entered in favor of Town & Country Estates, Inc.

The United States Court of Appeals for the Eighth Circuit applied an inapplicable rescission measure of damage rule because the new owner of the shopping center released Mr. Fong from his lease obligations at the shopping center. Town & Country Estates, Inc. neither participated in this decision nor received any benefits from this decision.

This fortuity is the underpinning of the United States Court of Appeals' opinion. However, the relative positions of the parties litigant are frozen at the time the Complaint is filed.

First National Bank of Kansas City v.
Kavorinos, 364 Mo. 947, 270 S.W.2d 23, 26 (Mo. 1954). At the time the Complaint was filed, Mr. Fong was in possession of the premises, was retaining possession of the premises and was not

released from his lease obligations by this petitioner or by anyone else.

The United States Court of Appeals' justifies its application of the rescission measure of damages by stating that at the time of trial Mr. Fong "no longer retains the property." (Appendix A, p. A-11). The fortuity of being released from the lease obligations, by a person other than Town & Country Estates, Inc., cannot change the cause of action or the decisional law of Missouri.

The United States Court of Appeals for the Eighth Circuit is bound by the law of Missouri as it currently exists. When the law is clear, as in the instant matter, no Court should be allowed to totally depart from it.

CONCLUSION

For the reasons stated above, it is evident that the United States Court of Appeals for the Eighth Circuit has so far departed from Missouri

decisional law that this Court should exercise its supervisory powers and grant the writ of certiorari requested herein.

Respectfully submitted,

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October, 1979

APPENDIX A

THE DECISIONS BELOW

The following are set forth successively, the opinion of the United States Court of Appeals for the Eighth Circuit; the judgment of the United States Court of Appeals for the Eighth Circuit; the order of the United States Court of Appeals for the Eighth Circuit denying petitioner's motion for rehearing; the judgment of the United States District Court for the Western District of Missouri, Western Division; the order of the United States District Court for the Western District of Missouri, Western Division, denying petitioner's motion for judgment or for a new trial.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 79-1010

Li Ren Fong,

*

Appellee,

* Appeal from the United States District Court * for the Western District of Missouri

v.
Town & Country Estates,
Inc.,

*

Appellant.

*

Submitted May 14, 1979

Decided June 19, 1979
Rehearing and Rehearing En Banc
Denied July 10, 1979

Before BRIGHT, HENLEY and McMILLIAN, Circuit Judges.

McMILLIAN, Circuit Judge.

Appellant, Town & Country Estates, Inc., appeals from a judgment entered on a jury verdict in favor of appellee, Li Ren Fong, on Fong's claim that he was defrauded by Town & Country. The jury

awarded Fong \$14,400 in actual damages and \$65,600 in punitive damages.

For reversal Town & Country argues that: (1) the trial court instructed the jury and received evidence on an improper measure of damages; (2) Li Ren Fong failed to adduce sufficient evidence to support an award of punitive damages; and (3) the punitive damages assessed were excessive. For the following reasons, we affirm the judgment of the district court.¹

In September, 1974, Li Ren Fong entered into a lease agreement with Town & Country Estates, which managed the Windmill Square Shopping Center in Overland Park, Kansas, which was under construction and scheduled for completion in November, 1974. The five-year lease provided for a space

¹The Honorable John W. Oliver, Chief Judge, United States District Judge for the Western District of Missouri.

in the shopping center at a minimum monthly rent of \$534. As provided in the agreement, the retail space Fong rented consisted merely of bare concrete walls and floor. Fong installed drywalls, partitions, ceilings, plumbing, light fixtures and other improvements which were necessary to establish a retail gift shop. On December 7, 1974, Fong opened his shop.

On November 15, 1975, Fong instituted the present suit alleging that he was falsely induced to lease the space by Lee M. Fowler, vice-president of Town & Country, who represented that at the time Fong negotiated his lease, fifty percent of the shopping center was already leased. Count I of the complaint sought rescission of the lease agreement and \$150,000 damages. Count II sought \$150,000 actual damages and \$500,000 punitive damages. On December 1, 1975, Town & Country sold the shopping center and the new owner released Fong from his lease obligations. In April, 1976, Fong vacated the premises. Because Fong had been released from his rental contract by the

new owners of the shopping center, he dropped his claim for rescission in Count I prior to trial.

(1) There were two trials in this case. In both trials the juries returned verdicts for Fong finding that at the time Fong entered into the lease much less than fifty percent of the shopping center was leased and that, in fact, Fowler misrepresented the facts to Fong. Fong was awarded \$19,200 actual damages and \$20,000 punitive damages in the first trial. The trial court then granted Town & Country's motion for a new trial on the ground the jury had returned inconsistent verdicts. The second trial commenced November 7, 1978; this time the jury awarded Fong \$14,400 actual damages and \$65,600 punitive damages. This is the verdict from which Town & Country appeals. The only issue raised concerns the amount of damages.²

²Appellant also argued that Fong failed to adduce sufficient evidence to prove Town & Country made misrepresentations to him. According to appellant, Fowler's statements that fifty percent

(2) Town & Country's first contention of error is that the trial court improperly instructed the jury that

having found the issues in favor of the plaintiff you must award plaintiff such sum as you believe will fairly and justly compensate plaintiff for any actual damages you believe he sustained as a direct result of the occurrence mentioned in the evidence.

According to appellant, this instruction allows Fong to recover "out-of-pocket" expenses, i.e.,

²(cont'd) of the shopping center was leased were merely future projections and because "fraud 'cannot ordinarily be predicated on unfulfilled promises or statements as to future events,'" Reed v. Cooke, 331 Mo. 507, 55 S.W.2d 275, 278 (Mo. banc 1932), citing 51 A.L.R. 49, there was no fraud here. Appellant's argument is frivolous. At trial Fowler testified that his claims that fifty percent of the shopping center was leased were merely what Town & Country hoped would occur in the future. Fong testified that Fowler represented that the shopping center was fifty percent leased as of September, 1974, when they were negotiating his lease. Thus, the point appellant raises on appeal is a credibility question which has already been decided by the jury and which is entitled to great deference by this court. Cf. United States v. Holmes, 594 F.2d 1167 at 1174 (8th Cir. 1977), citing United States v. Miles, 472 F.2d 1145, 1146-47 (8th Cir.), cert. denied, 412 U.S. 907, 93 S.Ct. 2299, 36 L.Ed.2d 972 (1973).

"the amount . . . paid with interest plus incidental losses and expenses suffered as a result of the seller's misrepresentations," Salmon v. Brookshire, 301 S.W.2d 48, 54 (Mo. App. 1957), which are appropriate only when the defrauded party does not retain the property. In this case, argues appellant, Fong retained the property for sixteen months and, therefore, the appropriate measure of damages is the "benefit-of-the-bargain" or "the difference between the purchased property's real value and its value if it had been as represented." Salmon v. Brookshire, supra, 301 S.W.2d at 54. According to appellant, because the jury was instructed improperly, it was confused and awarded plaintiff an inappropriate amount.³

³We note that how the court characterized the measure of damages due to Fong more than likely had little effect in the outcome of this case, and, if there had been an effect it probably would have been in appellant's disfavor. According to the parties, the "out-of-pocket" expenses awarded here are the amounts Fong expended on improvements for the leased space. If the jury had been instructed to give Fong damages according

(3, 4) In this diversity case Missouri law controls and appellant's statement of the Missouri law on damages is correct. Both the "benefit-of-the-bargain" and "out-of-pocket" damage awards seek to award a plaintiff damages for the losses proximately caused by the defendant's fraud.

Cf. Kendrick v. Ryus, 225 Mo. 150, 123 S.W. 937, 939 (Mo. 1909). "Benefit-of-the-bargain" damages are awarded when the defrauded party retains the property while "out-of-pocket" damages are awarded when the defrauded party rescinds the agreement and returns the property. Salmon v. Brookshire, supra, 301 S.W.2d at 54; Schroeder v. Zykan, 255

3(cont'd) to the "benefit-of-the-bargain" test, the jury would still have the option of awarding him "special damages," which the parties have also characterized as the amount Fong expended for improvements. Miller v. Higgins, 452 S.W.2d 121, 125 (Mo. App. 1970); Salmon v. Brookshire, 301 S.W.2d 48, 56 (Mo. App. 1957). Thus, if the case were remanded, Fong could possibly receive as damages the "benefit-of-the-bargain" to which he is entitled and "special damages," which altogether would exceed the amount received pursuant to the "out-of-pocket" instruction actually given.

S.W.2d 105, 110 (Mo. App. 1953). This is because the "benefit-of-the-bargain" measure of damages allows the injured party to retain the property and collect as damages the amount "the property would have been worth had it been as represented." Kendrick v. Ryus, supra, 123 S.W. at 939. This measure of damage is, by definition therefore, based upon retention of the property. Salmon v. Brookshire, supra, 301 S.W.2d at 54. In comparison, an award of "out-of-pocket" damages is premised upon the assumption that the injured party has returned the property and is entitled to the expenses which were incurred in accepting and then rescinding the agreement. *Id.*; Schroeder v. Zykan, supra, 255 S.W.2d at 110; accord, Salter v. Heiser, 39 Wash. 2d 826, 239 P.2d 327, 330 (1951).

(5, 6) The damage instructions here, which the parties classify as allowing "out-of-pocket" expenses, were proper because plaintiff was no longer in possession of the premises or even obligated to lease the premises when the amount

of damages was assessed. Granted, rescission is generally sought simultaneously with a request for out-of-pocket damages, see, e.g., Miller v. Andy Burger Motors, Inc., 370 S.W.2d 654, 660 (Mo. App. 1963); Schroeder v. Zykan, supra, 255 S.W.2d at 111, but by the time of trial Fong was not seeking rescission.⁴ However, as can be seen from Fong's complaint, he initially sought rescission simultaneously with his request for out-of-pocket damages. It was because of the peculiar events in this case, namely, the new owners of the shopping center released Fong from his lease after his complaint had been filed and before trial

⁴Generally, the relative position of the parties is frozen at the time the complaint is filed; First National Bank of Kansas City v. Kavorinos, 364 Mo. 947, 270 S.W.2d 23, 26 (Mo. banc 1954), and when the complaint was filed in this case, Fong was in possession of the property. In this instance, however, it was more accurate for the trial court to assess damages on the basis of the current positions of the parties Id.; cf. Wocet v. Seacat, 272 S.W.2d 449, 451 (Mo. Ct. App. 1948).

commenced, that it was no longer necessary for Fong to seek rescission by the time trial began. This failure to seek rescission simultaneously with a request for out-of-pocket damages does not negate the propriety of the out-of-pocket damage award in this case. The sine qua non of whether out-of-pocket damages rather than benefit-of-the-bargain damages should be awarded is whether the defrauded party retains the property at issue. Here Fong no longer retains the property; therefore, out-of-pocket damages are appropriate.

(7, 8) Appellant also contends that the award of punitive damages was erroneous. It advances two arguments: first, there was insufficient evidence to support a finding of legal malice which must be proven to obtain punitive damages, Ackmann v. Keeney-Toelle Real Estate Co., 401 S.W.2d 483, 489 (Mo. banc 1966); and second, appellant argues that, even if the elements for punitive damages were proven, the amount awarded was excessive. We reject both arguments. "The question of whether or not punitive damages shall

be awarded and if so, in what amount rests peculiarly in the discretion of the jury." Wisner v. S.S. Kresge Co., 465 S.W.2d 666, 669 (Mo. Ct. App. 1971); accord, Northern v. McGraw-Edison Co., 542 F.2d 1336, 1349-50 (8th Cir. 1976), cert. denied sub nom. McGraw-Edison Co. v. Soper, 429 U.S. 1097, 97 S.Ct. 1115, 51 L.Ed.2d 544 (1977). Appellant has not even attempted to produce evidence as to why the jury erred in finding legal malice or how it erred in assessing the amount of punitive damages. We therefore defer to the jury's determination.

For the foregoing reasons, the judgment of the district court is affirmed.

JUDGMENT
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 79-1010
September Term, 1978

Li Ren Fong, *
Appellee, *
v. *
Town & Country Estates, *
Inc., *
Appellant. *

APPEAL FROM the United States District Court
for the Western District of Missouri.

THIS CAUSE came on to be heard on the original
designated record of the United States District
Court for the Western District of Missouri and
briefs of the respective parties and was argued by
counsel.

ON CONSIDERATION WHEREOF, it is now here
ordered and adjudged by this Court, that the judg-
ment of the said District Court, in this cause, be,

and the same is hereby, affirmed in accordance
with the opinion of this Court.

June 19, 1979

A true copy.

ATTEST:

Clerk, U.S. Court of Appeals, Eighth Circuit

July 24, 1979.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 79-1010
September Term, 1978

Li Ren Fong, *
Appellee, * Appeal from the
v. * United States District
Court for the Western
District of Missouri
Town & Country Estates, *
Inc. Appellant. *

The Court having considered petition for
rehearing en banc filed by counsel for appellant
and, being fully advised in the premises, it is
ordered that the petition for rehearing en banc be,
and it is hereby, denied.

Considering the petition for rehearing en banc
as a petition for rehearing, it is ordered that
the petition for rehearing also be, and it is
hereby, denied.

July 10, 1979

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI

Civil Action File No. 75CV761-W-1

LI REN FONG, }
Plaintiff, }
V. }
TOWN AND COUNTRY ESTATES, }
INC. }
Defendant. }

JUDGMENT

This action came on for trial before the Court and a jury, Honorable John W. Oliver, Chief, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict.

It is Ordered and Adjudged that plaintiff Li Ren Fong recover of the defendant Town and Country Estates, Inc., the sum of fourteen thousand four hundred dollars (\$14,400.00) actual damages, with his costs of action. Further, that plaintiff

6

**Li Ren Fong recover of the defendant Town and
Country Estates, Inc., the sum of sixty five
thousand six hundred dollars (\$65,600.00) punitive
damages, with his costs of action.**

**Dated at Kansas City, Missouri, this 9th day of
November, 1978.**

/s/ R. F. Conner
Clerk of Court

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

LI REN FONG

:

Plaintiff,

:

vs.

: No. 75 CV 761-W-1

TOWN & COUNTRY ESTATES,
INC.

Defendant.

:

ORDER

This case presently pends on defendant's motion for judgment in accordance with defendant's motion for directed verdict or for new trial. We have carefully read and considered defendant's motion and suggestions in support and plaintiff's suggestions in opposition and have concluded that defendant's motion is without merit and should be denied.

Accordingly, it is hereby

ORDERED that defendant's motion for judgment

in accordance with defendant's motion for directed verdict or for new trial should be and the same is hereby denied.

/s/ John W. Oliver
Chief Judge

Kansas City, Missouri

November 30, 1978

